

Bell Atlantic
1300 I Street, N.W.
Suite 400 West
Washington, DC 20005

Donald C. Brittingham
Director - Wireless Matters
Government Relations
202-336-7873

EX PARTE OR LATE FILED



April 14, 1999

RECEIVED

APR 14 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 - 12th Street, SW
Room: TW-A325
Washington, DC 20554

Re: WT Docket No. 97-207

Dear Ms. Salas:

On February 4, 1999, Mark Tuller of Bell Atlantic Mobile delivered a letter to Tom Sugrue, Chief of the Wireless Telecommunications Bureau, asking the Bureau to confirm that BAM's proposed CPP offering is CMRS. On March 1, the undersigned sent a follow-up letter to James Schlichting, Deputy Chief of the Wireless Bureau, providing further clarification of BAM's request. Copies of these letters are attached.

While the Commission's ex parte rules do not require that these correspondences be disclosed, we are filing them with your office at Mr. Schlichting's request. Please include a copy of these ex parte presentations in the record for the above captioned proceeding. If you have any questions, you may call me on (202) 336-7873.

A handwritten signature in cursive script, appearing to read "Dan Brittingham".

Attachment

cc: J. Schlichting

No. of Copies rec'd 071
List ABCDE

Bell Atlantic Mobile, Inc.
180 Washington Valley Road
Bedminster, NJ 07921
908 306-7390
FAX 908 306-7329

S. Mark Tuller
Vice President - Legal and External Affairs
General Counsel and Secretary

February 4, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. Thomas J. Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Re: Calling Party Pays

Dear Mr. Sugrue:

Bell Atlantic Mobile, Inc. (BAM) plans to begin offering a "Calling Party Pays" (CPP) service in one or more of its East Coast markets in the early part of 1999. BAM believes that the deployment of CPP will increase the use of wireless as an alternative to landline service, promoting the key Commission goal of developing competition in landline markets.

Two specific questions, however, impact BAM's plan to deploy CPP: (1) Is the CPP offering a "commercial mobile radio service"? (2) Does the format of the notice to callers before they incur a charge for calls to CPP numbers establish informed consent, so that, if callers continue the call, they will be responsible for paying the charge? While BAM believes the answer to each question is "yes," confirmation by the Bureau will provide certainty that will help BAM in its plans to deploy CPP, and will encourage CPP's potential to intensify wireless competition with landline services.

Because BAM is working toward a deployment of new CPP service in the next few months, it would appreciate the Bureau's prompt assistance and response to this letter. BAM asks that the Bureau confirm, by March 15 or as soon thereafter as possible, that BAM's proposed CPP offering is CMRS, and that BAM's plan for notifying callers of charges is just and reasonable and provides informed consent that would entitle BAM to collect those charges.

Deployment of CPP Will Bring Significant Public Interest Benefits.

In October 1997, the Cellular Telecommunications Industry Association (CTIA) filed a Petition for Rulemaking which sought the adoption of rules for the offering of Calling Party Pays service. CTIA demonstrated that promulgating minimal federal rules to ensure consistent regulation will encourage CPP's broader availability. CTIA showed that CMRS carriers' offering of CPP will help promote wireless growth and its evolution as a competitor for landline traffic.

The comments back CTIA's conclusions. CPP gives wireless users the option of having calls billed to those who actually initiate them. With CPP, wireless users will be more likely to leave their phones on to receive calls if they are not charged for incoming calls and to distribute their numbers more widely. BAM's experience with CPP in Europe shows that CPP has allowed wireless to be fully integrated into Europe's communications networks, with resulting benefits to the public. By encouraging usage and causing more balanced traffic, CPP will bring similar benefits to the American public.

CPP will also promote wireless as a competitor to wireline by removing the charge to wireless users for incoming calls, thereby structuring wireless pricing like wireline. Unlike conventional wireless pricing, where the subscriber pays for both incoming and outgoing calls, CPP pricing will parallel the way in which landline services are priced (where, with a few exceptions such as toll-free numbers, the calling party pays for all calls). This will help to drive down the price of service to wireless users, encouraging them to use their phones more frequently and for longer calls. This in turn will stimulate usage, enabling lower overall wireless prices.

CPP will thus give wireless providers the flexibility to offer a wide range of services and pricing options and will stimulate the use of wireless as an alternative to landline service. Promoting just such competitive alternatives to incumbent landline services was one of the key goals of the 1996 Telecommunications Act, and is a preeminent goal of this Commission.

BAM continues to support CTIA's petition for rulemaking as a mechanism for the Commission to promote the broader deployment of CPP and the many benefits it will bring. While BAM understands that the Commission may not be prepared to propose formal rules at this time, BAM nonetheless needs prompt clarification on two discrete issues as part of the process for structuring its new CPP offering. Each issue can be addressed by the Bureau on delegated authority pursuant to existing law and precedent. No new rules are needed.

BAM's Proposed CPP Service

BAM is looking toward offering CPP in one or more of its East Coast markets early this year. Wireless users with CPP will pay no per-minute or other charges for most incoming calls. BAM's use of Advanced Intelligent Network (AIN) features gives the mobile user the flexibility of overriding the CPP arrangement and paying for some types of calls. For example, subscribers could designate in advance particular numbers such as their home and/or office numbers as not being subject to CPP. They could create a call list of numbers for whom they will "accept the charges" or they could toggle this feature on and off. With this flexibility, customers can tailor their mobile communications in ways that best meet their needs, encouraging them to rely on their mobile handset rather than on wireline phones.

When callers dial the mobile number of a wireless user, and are not on the users' list of numbers that are not subject to CPP, the callers will hear a message informing them that they

will incur a charge from BAM for the call and specifying the per-minute rate. The message will advise them to hang up if they do not wish to accept the charge. Callers who then complete the call will be billed at the rate stated in the message. BAM plans to enter into billing arrangements with the LEC or a billing vendor to collect the charge.

BAM's CPP Offering is CMRS.

Sections 3(n) and 332 of the Communications Act and Part 20 of the Commission's Rules provide the legal authority for determining whether a particular service is a "commercial mobile radio service." BAM believes that its CPP offering constitutes CMRS, and asks the Bureau to confirm this. First, the CPP offering is a "mobile service" because it is a communications service involving radio service that is conducted between fixed and mobile stations or between two mobile stations. Second, it is a "commercial mobile radio service" because it will be provided for profit, will be interconnected with the PSTN, and will be available to a substantial portion of the public. 47 U.S.C. §§ 3(n), 332; 47 C.F.R. §§ 20.3, 20.7, 20. CPP will be offered as a commercial service just like other BAM CMRS offerings.

Under the Act and Commission Rules, CMRS is exempt from state rate and entry regulation. 47 U.S.C. § 332(c), 47 C.F.R. § 20.13. So, too, is CPP. There is an additional reason why federal oversight is essential. By its very nature, CPP is a multistate service. For example, under BAM's offering, calls could be placed from any state into BAM's markets where CPP will be offered. By confirming that BAM's CPP offering is CMRS, the Bureau will clarify that a state may not prohibit this offering or regulate the rates charged, and thus avoid the obvious impediments that state-by-state regulation would create.¹ The record in response to the CTIA petition would fully support this determination as well. BAM thus asks that the Bureau confirm that its proposed CPP offering would constitute CMRS.

The Notice to the Calling Party is Just and Reasonable and Establishes Informed Consent to Pay the Charge.

The above-described notice will be given in the form of an intercept message to any callers to a CPP wireless number as soon as they dial the number. BAM asks the Bureau to confirm that this format provides adequate information to calling parties which allows them to make an informed decision about whether to continue with the call. The notice advises the calling party that he or she has dialed a number for which a charge will be imposed if the call is continued. It identifies the per-minute price that will be imposed for the call. And it gives the

¹ While a state may file a petition with the Commission under Section 332(c)(1)(B) to seek authority to regulate some or all CMRS rates, as of today, no state has a pending petition to do so. BAM believes that no state can impose rate regulation of CPP without filing such a petition and being granted that authority.

caller an opportunity to terminate the call before BAM imposes any charge. Because the caller will have information with which to make an informed choice about continuing the call to the CPP number, the notice will achieve the purpose of informed consent.

CTIA's petition for rulemaking asks that the Commission adopt national CPP notification rules or guidelines that will inform calling parties of any charges. This step will be useful in ensuring that customers are notified in a consistent way across the nation where CPP is available. It would fulfill Congress' mandate that all CMRS providers be subject to consistent national policies. Any guidelines could include BAM's format as an example. Other forms of notice raised in the record should also establish informed consent. For example, carriers might provide callers with the option to obtain information by dialing a toll-free number or by pressing the # or * sign. Alternatively, CPP could be provided through the use of a 1+ prefix or a dedicated NXX code.

In the meantime, however, BAM needs a ruling that the format it is planning is just and reasonable and that it establishes informed consent that would be deemed sufficient to entitle it to seek payment from the calling party. BAM's CPP offering will provide a communications service of value to both the called party and the calling party who completes the call after being informed of the charge. But BAM will not have a written contract with the calling party. BAM will also not have a tariff on file, since the Commission has prohibited CMRS providers from filing domestic services tariffs. 47 C.F.R. § 20.13. BAM thus faces the practical obstacle of not having available to it the two most common mechanisms available to telecommunications carriers to recover for the services they provide, written contracts or tariffs.

BAM submits that when calling parties complete a call to a CPP number after being notified there will be a charge, they have given informed consent that obligates them to pay BAM for the service, because the callers know that if they continue the call they will be charged. In an analogous situation, the Commission has established that similar informed consent can be deemed to establish a carrier's contractual right to recover charges from calling parties where there is no written agreement. In 1996, the Commission detariffed "casual calling services," where a caller places a call over the facilities of a carrier with which he or she has no service agreement. Carriers argued that, without tariffs, they would not be able to recover the rate charged for the casual calling service. But the Commission held that, where the calling party was notified of the applicable rate or provided billing or other information, then proceeded to make the call, both adequate notice and informed consent existed:

A carrier could seek recovery under an implied-in-fact contract theory if a customer has used the carrier's services, with knowledge of the carrier's charges, but has not executed a written contract. Under this theory, the customer's acceptance of the services rendered would evidence his agreement to the contract terms proposed by the carrier. . . . By providing billing or payment information (e.g., credit card information or a billing number) and completing use of the

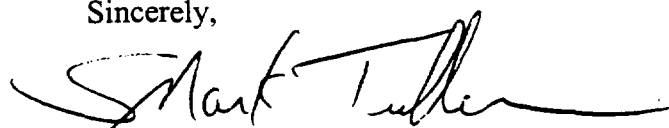
telecommunications service, casual callers may be deemed to have accepted a legal obligation to pay for any such services rendered.²

This Commission precedent supplies the Bureau with authority to reach the same conclusion with respect to BAM's CPP service. The Commission decided that casual callers could be deemed to have accepted a duty to pay if they were given information about the rates to be charged in advance. BAM will also provide information to calling parties and enable them to terminate the call before it imposes a charge. BAM thus asks the Bureau to confirm that the format for its notice is just and reasonable and establishes informed consent by the calling party.

Conclusion

BAM is excited about the potential for CPP as a service that will provide a major boost to the public's use of wireless services, and to the Commission's goal of promoting wireless-landline competition. BAM stands ready to provide the Bureau with any information that it needs in order to respond to this request by March 15.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Mark Tuller", with a stylized flourish at the end.

S. Mark Tuller

² Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, Second Report and Order, CC Docket No. 96-61, 11 FCC Rcd 20730 (1996).

Bell Atlantic
1300 I Street, N.W.
Suite 400 West
Washington, DC 20005

Donald C. Brittingham
Director - Wireless Matters
Government Relations
202-336-7873



March 1, 1999

Mr. James Schlichting
Deputy Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3C254
Washington, D.C.

Re: Calling Party Pays

Dear Mr. Schlichting:

On February 18, 1999, John Scott, counsel for Bell Atlantic Mobile, and I talked with you by telephone regarding BAM's February 4, 1999 request for clarification on the regulatory status of CPP. In that request, BAM asked the Bureau to confirm that BAM's planned CPP offering is a "commercial mobile radio service" (CMRS), and thus, free of state rate and entry regulation. BAM also asked the Bureau to find that the notice that BAM will use to notify callers of CPP charges is just and reasonable and establishes informed consent to pay the charge. Both of these clarifications are necessary to support BAM's introduction of CPP. The following is provided as further clarification of BAM's request.

During our call, you questioned whether the Bureau could provide BAM with the clarification it seeks in light of the Commission's finding in the *Arizona Decision*. While the regulatory status of CPP was not a focus of the Commission's Order in that proceeding, we believe that the Order confirms that CPP is CMRS.

In its Order, the Commission concluded that "billing practices are considered 'other terms and conditions' of CMRS offerings, not rates, and the ACC retains authority to regulate such practices". (Emphasis added. See Order, ¶ 59). The Order specifically refers to billing practices associated with CPP, i.e., the way in which CPP services are billed to customers including through billing services that may be provided by LECs. The Order does not conclude that States may regulate the rates for the actual CPP services provided to customers, only the practices used for billing such charges.

In supporting its conclusion that States may regulate billing practices, the Commission points to the legislative history of Section 332(c)(3) of the Communications Act. (See Order, ¶ 73). The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that States may regulate other terms and conditions of CMRS, and indicated that such terms and conditions would include “customer billing information and practices and billing disputes”. (Emphasis added). In the context of CPP, one might conclude that “billing information” would include the billing name and address (BNA) provided by the LEC to the CMRS carrier to facilitate billing. “Billing practices” might include the billing service provided to the CMRS carrier by the LEC. However, there is nothing in the legislative history of Section 332 or in the Commission’s Order that supports the states’ authority to regulate CPP rates.

Importantly, the Commission’s review of Section 332 and its legislative history in the *Arizona Decision* would not even be relevant if CPP were not considered CMRS. Section 332 applies only to CMRS. The fact that the Commission applies an “other terms and conditions” analysis in the first place presumes that CPP is CMRS.

In its letter of February 4, BAM is not asking the Bureau to find that billing practices are not “terms and conditions”, or to preempt the States’ rights to regulate such practices if they are. The Commission may wish to pursue those issues as part of a more comprehensive rulemaking proceeding. At this point, BAM is only asking the Bureau to confirm that CPP is CMRS, and thus, subject to the provisions of Section 332 of the Act. This means that a State may not prohibit the offering of CPP services or regulate CPP rates unless it successfully petitions the Commission to do so.

The Public Utilities Commission of Ohio, responding to the Commission’s Notice of Inquiry, characterizes CPP as “a rate issue for landline LEC customers, not CMRS customers”, and therefore, concludes that CPP jurisdiction must fall to the States. (See Comments of Ohio Commission in response to CTIA Petition for Expedited Consideration, filed May 8, 1998). It is apparent from these comments that there is some uncertainty as to the regulatory status of CPP. The Commission can remove this uncertainty by confirming that the CPP service BAM intends to offer is, in fact, CMRS.

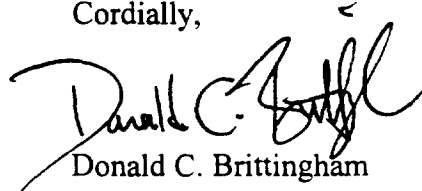
BAM’s CPP offering provides a service both to BAM’s mobile subscribers and to customers initiating calls to these mobile subscribers. First, CPP allows BAM’s mobile subscribers to receive all or a portion of their incoming calls without airtime charges. Second, it permits callers, including those calling from landline phones, to reach those mobile subscribers that have chosen the CPP option. CPP is a mobile service because it is “a radio communications service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves”. (Emphasis added. See §20.3). Therefore, the “landline” caller that initiates the CPP call and the mobile subscriber that receives the CPP call are both BAM’s “CMRS customers”.

The fact that BAM will establish a service provider relationship with the landline caller is one reason why BAM has placed such importance on the notification process. As outlined in its letter of February 4, BAM seeks confirmation from the Bureau that its process for notifying callers of the CPP charge is just and reasonable and establishes informed consent. By doing so, the Bureau can help to ensure that customers who buy BAM's CPP service will be obligated to pay.

BAM's CPP service will provide benefits to mobile and fixed customers alike. CPP will allow mobile customers to better control their costs and makes wireless service look more like landline service. The CPP service offered to calling parties will provide them with greater choice and control by allowing them to decide when to communicate with a mobile subscriber. Today, control is in the hands of the mobile subscriber because he or she can withhold their number, turn off their phone, or refuse to accept incoming calls. CPP will drastically change this model by putting control in the hands of the person initiating the call. Thus, CPP will bring the benefits of anytime, anywhere communications to a greater number of consumers, including those who are not mobile.

I hope this provides you with a better understanding of BAM's CPP offering and helps to clarify our earlier request. Please call me if you have further questions.

Cordially,



Donald C. Brittingham

cc: N. Boocker
J. Cimko
J. Poltronieri